EG-6

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September 26, 2001

James L. Connaughton
Chairman
Council on Environmental Quality
Executive Office of the President
17th and G Streets, NW
Washington, DC 20503

Attention: Task Force

Dear Chairman Connaughton:

I am writing in response to the Federal Register Notice[1] in which the Council on Environmental Quality ("CEQ") announced that it was seeking written comments on the formation of the interagency task force ("Task Force") to expedite the federal review process of energy-related projects. Tucson Electric Power Co. ("TEP") applauds the Administration's efforts on this issue and believes that the formation of the Task Force is an important step in ensuring that all agencies in the federal government that have a say in the permitting process speak with one voice.

As you may recall, we met at the Edison Electric Institute meeting in Colorado Springs last month and briefly discussed a project we have that is currently going through the permitting process. You asked me to provide you with more information about the project, and I am pleased to do so in the context of this request for comments on permitting issues associated with new energy projects.

The project we discussed was TEP's proposal to build two new coal-fired electric generating units at our Springerville facility here in Arizona. For the reasons discussed below, we believe this project is entirely consistent with President Bush's approach to the development of new sources of energy as outlined in the National Energy Policy report. Unfortunately, the project is meeting with resistance from Region IX of the Environmental Protection Agency

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[1] Energy Task Force, 66 Fed. Reg. 43586 (August 20, 2001)

("EPA Region IX") based on regulatory analysis that TEP contends is entirely inconsistent with both the President's stated policies and the law.

TEP is currently seeking expedited approval from the Arizona Department of Environmental Quality ("ADEQ") to begin construction of the two new units (Units 3 and 4) at Springerville. The Springerville facility was originally sited for four units in 1977, but only Units 1 and 2 have been built so far. When completed, Units 3 and 4 will add 760 MW of new base load electric energy for Arizona. Throughout the permitting process, TEP has adopted an environmentally sound approach to maintaining air quality. TEP's permit application calls for significant voluntary reductions in SO_2 and NO_x emissions from existing Units 1 and 2. Those reductions, combined with the removal levels TEP has proposed for Units 3 and 4, would result in *no additional emissions of SO_2 and NO_x from the Springerville facility*, i.e., total emissions from 1520 MW of generation would be the same or lower than currently produced from 760 MW. This would result in emission rates among the lowest in the nation.

TEP has gone to great length to ensure that this is an environmentally sound project and ADEQ has been supportive of TEP's approach. However, EPA Region IX is considering using the permitting process for Units 3 and 4 as an opportunity to reexamine the 1977 permit issued for Units 1 and 2 and to apply even more stringent emissions standards to those units. EPA Region IX contends that TEP did not commence and complete construction of Units 1 and 2 within a reasonable time of receiving the permit. We believe that EPA Region IX is wrong about the facts and law in this case. We have provided substantial evidence of compliance with EPA Region IX standards relating to time of construction of Units 1 and 2 and would be happy to share it with you.

In addition to being legally erroneous, EPA Region IX's current regulatory posture with respect to TEP's proposed Springerville expansion appears to be inconsistent with the policies of the Administration outlined in the National Energy Policy report. The report states that "if rising U.S. electricity demand is to be met, then coal must play a significant role."[2] The report also states that one of the factors that hurts development of new coal-fired generating capacity is "uncertainty over rules requiring air permits for certain modifications to power plants."[3]

On May 18, 2001, President Bush followed through on one of the recommendations in the report and issued an Executive Order requiring all federal agencies to take action consistent with applicable law to "expedite projects that will increase the production, transmission or conservation of energy."[4] The order directs agencies to do this "while maintaining safety, public health and environmental protections."[5] The president's policy could not be clearer: this Administration supports the development of environmentally sound, new coal-fired generation and directs EPA Region IX to expedite permit consideration for projects like the Springerville expansion. As Chairman of the Task Force, you are charged with coordinating the implementation of this policy.

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[2] Report of the National Energy Policy Development Group, p. 5-14 (May 2001)
[3] *Id.*
[4] Executive Order No. 13212, *Actions to Expedite Energy-Related Projects.*
[5] *Id.*

If EPA Region IX persists in its current regulatory posture toward the expansion of the Springerville facility, the likely result will be to jeopardize the project at a time when additional generating resources are desperately needed. This project is important to both our company and Arizona. Like many states in the west, Arizona faces the prospect of an electricity crunch as a result of our economic and population growth. While there are numerous proposals to site new generation facilities in the state, many of these projects are merchant plants whose ultimate benefits to Arizonans remain unclear. In contrast, TEP's Springerville expansion will serve the base load needs of the state. It also provides a combination of other benefits that make it an ideal project. The Springerville expansion would:

- add 760 megawatts ("MW") to Arizona's base load generation resources without increasing SO_2 or NO_x emissions at first, and resulting in a substantial net SO_2 emissions decrease beginning in 2011;
- reduce the need to burn natural gas and diesel in Arizona's nonattainment metropolitan areas;
- lessen future dependence on oil and diesel generation;
- supply energy for Arizona residential and industrial customers;
- require minimal new transmission facilities;
- provide fuel diversity and thereby reduce fuel price volatility, and;
- utilize union labor for construction and operations.

It strikes us as unusual and unfair that EPA Region IX would turn back the clock and reexamine the permit issued a quarter century ago for Units 1 and 2, particularly when this project will result in no increase in the total emissions of SO_2 and NO_x. In fact, following the project completion, among all coal plants in the Southwest this plant will be in the lowest one third for SO_2 emissions and will be the absolute lowest for NO_x emissions. In the overall balance of energy needs and environmental protection this project represents a very effective and responsible generation resource addition.

We have discussed our concerns with Region IX staff and have provided them the detailed legal and factual analyses mentioned above. Unfortunately, we have been unable to resolve our differences.

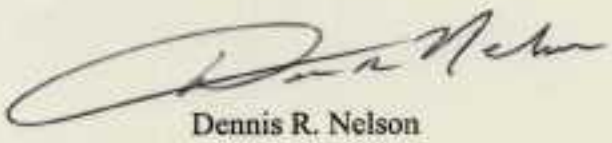
Arizona Governor Jane Hull supports this project and has expressed her support directly to EPA Administrator Christine Todd Whitman. In addition, seven of eight members of the Arizona congressional delegation have written a letter to Administrator Whitman asking that she report to them on EPA's position. I have enclosed this letter for your review. In addition, I am

enclosing a brief description of the project (as requested in the Federal Register Notice) and a detailed legal analysis of the issues raised by EPA Region IX.

This project fits well with the President's policy for the development of new sources of environmentally sound electric energy and deserves the Administration's support. I would be pleased to provide you with additional information about the project and I am available to meet with you or other members of the Administration to discuss the project in more detail.

Thank you for your consideration.

Sincerely,



Dennis R. Nelson

Enclosures

PROJECT INFORMATION

1. **Name of Project**

Springerville Expansion (adding Units 3 and 4)

2. **Entity Proposing Project**

Tucson Electric Power Co. ("TEP")

3. **Category of Project**

Electricity Generation

4. **Brief Description of Project**

TEP's Springerville facility currently consists of two coal-fired generating facilities with total net capacity of 760 MW. The Springerville facility was originally sited for four units in 1977, but only Units 1 and 2 have been built so far. TEP is currently seeking the permits necessary to construct Units 3 and 4, which will add an additional 760 MW of new base load electric energy for Arizona. Throughout the permitting process, TEP has adopted an environmentally sound approach to maintaining air quality. TEP's permit application calls for significant voluntary reductions in SO_2 and NO_x emissions from existing Units 1 and 2. Those reductions, combined with the removal levels TEP has proposed for Units 3 and 4, would result in *no additional emissions of SO_2 and NO_x from the Springerville facility*, i.e., total emissions from 1520 MW of generation would be the same or lower than currently produced from 760 MW. This would result in emission rates among the lowest in the nation.

5. **Agencies Involved**

Federal: EPA, National Park Service, U.S. Forest Service

State: Arizona Department of Environmental Quality, New Mexico Department of Environmental Quality

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WARSAW, POLAND

May 23, 2001

TUCSON ELECTRIC POWER COMPANY
SPRINGERVILLE GENERATING STATION

Executive Summary

Almost a quarter century ago (*i.e.*, in December 1977), Tucson Electric Power Company (TEP or the Company) received a Prevention of Significant Deterioration (PSD) permit from EPA Region IX to construct a new greenfield generating station located in a remote site in Apache County approximately 16 miles northeast of Springerville, Arizona (the "Springerville source"). Shortly after issuance of that permit to construct two units, TEP entered into contracts with a boiler manufacturer to design, fabricate, and deliver both boilers. In February 1978, TEP informed Region IX and the State of Arizona that, in TEPs view, the boiler contracts constituted commencement of construction for purposes of the federal New Source Performance Standards (NSPS), making the 1971 Subpart D NSPS applicable to these units. Over the next 12 years, TEP kept the Region and the State informed of the construction related activities at the Springerville source. At no time did EPA raise any question about the reasonableness of the construction schedules for Units 1 and 2.

Eleven years after Unit 2 became operational, 16 years after Unit 1 became operational, and nearly two years after Region IX approved a State of Arizona Title V operating permit for the Springerville source, Region IX staff (based on guidance from EPA Headquarters Air Enforcement staff) had told TEP that Units 1 and 2 should have been subject to the Subpart Da NSPS, not the Subpart D NSPS. Region IX staff, based on the same guidance, also asserts that Unit 2 somehow lost its PSD authorization to construction under the 1977 PSD permit at some unspecified time in the 1980s and is now subject to more stringent PSD requirements. EPA staff threatens enforcement actions based on these new interpretations.

EPA Region IX staff based its interpretation on a 1979 "applicability" determination involving the addition of a new unit at an existing generating station located in the State of Maryland. This 1979 determination, according to EPA staff today, overrides EPA Region IX's prior and contemporaneous acquiescence in TEP's written communications to Region IX regarding construction at the Springerville source.

For the reasons discussed below, EPA staff's interpretation of the NSPS and PSD "grandfathering" rules would retroactively revoke the positions taken by Region IX in the 1970s,

1980s, and most recently reflected in the Title V operating permit for the Springerville source. EPA staff's unlawful retroactive interpretation is based on a 1979 determination involving the construction schedule for a new unit at an existing generating station in the eastern United States. This determination has no relevance to the schedule required to develop a new greenfield generating station in a remote area of Arizona. Finally, EPA has no authority to apply the 1980 PSD preconstruction permitting requirements to Unit 2 based on a determination in 2001 that Unit did not complete construction within a "reasonable time."

Introduction

TEP is currently in the process of seeking expedited approval from the Arizona Department of Environmental Quality to construct two new coal-fired units at the Springerville source, referred to here as Units 3 and 4. With respect to "new source review" (NSR) requirements under EPA's regulations implementing the PSD program, the Company intends to limit PSD review to particulate emissions from the two new units. For sulfur dioxide (SO_2) and nitrogen oxide (NO_x) emissions, TEP's plan is to reduce SO_2 and NO_x from Units 1 and 2 (*i.e.*, through additional controls) to a level that will enable the Company to "net out" and avoid having to undergo PSD review for those pollutants.

Netting out of PSD for SO_2 and NO_x will permit a doubling of the electric capacity at the site with no increase in the emissions of those pollutants. Being able to net out of SO_2 and NO_x PSD review is essential to expedite permitting of this expansion of the Springerville source and to ensure that this additional capacity will be available in the region by 2004.

From the very first meetings with EPA Region IX staff, those attending have raised a series of objections that could preclude netting out for SO_2 and NO_x. While those objections have not been made in writing, the gist of Region IX staff's response to the Springerville expansion appears to be that Units 1 and 2 must be further controlled without any netting credits.

The apparent basis for the Regional staff's latest objection is two-fold. First, the staff apparently contends that Units 1 and 2 are subject to the emission limitations set forth in the federal NSPS, 40 C.F.R. Subpart Da. From initial construction and operation of those units TEP has understood those units to be subject to the less stringent NSPS requirements of 40 C.F.R. Subpart D, and Region IX never expressed a different understanding before now. Second, while TEP was issued a PSD permit for Units 1 and 2 in December 1977, and the Company continuously constructed the source, including Unit 2, in conformity with that permit (with contemporaneous reports over the entire period describing those continuous construction activities), Region IX staff also has suggested that (i) Unit 2's PSD permit should have been terminated at some time during the 1980s, and (ii) TEP should have had to get a new PSD permit to continue construction that would be subject to the more stringent requirements of subsequent PSD regulations that were promulgated in 1980.

As discussed herein, there is no basis for EPA Region IX staff's position in either fact or law. Springerville Units 1 and 2 are Subpart D units under the federal NSPS, and Unit 2 was properly constructed according to the PSD permit for the Springerville source that EPA issued

pursuant to the regulations that were applicable at the time. Throughout the period of construction of both units, TEP, in oral and written communications with EPA Region IX and the State of Arizona, reported on the commencement and progress of construction on both units at the source, demonstrating the continuous nature of those activities at the source. At no time, to our knowledge, was there any question raised regarding the continuous nature of the construction or the reasonableness of the construction schedule for the Springerville source.

Background

On August 26, 1977, the Arizona Department of Health Services issued to the Company (then known as Tucson Gas & Electric Company) Installation Permit No. 1106 for the Springerville source (Units 1 and 2). During that same time period, the Company applied to EPA for a construction permit under the federal PSD regulations then in effect, identifying commercial operation dates of 1985 and 1987 for Units 1 and 2, respectively.[1] On December 21, 1977, EPA issued to TEP a PSD Permit and Approval to Construct for the Springerville source (Units 1 and 2).

TEP's construction planning initially envisioned that Unit 1 at the Springerville source would come on line in 1985, and that Unit 2 would come on line in 1987 – *i.e.*, a ten year construction schedule for the two-unit greenfield source, with the first unit being completed in seven years and the second unit being completed in 10 years. To that end, on January 30, 1978, the Company entered into a contract with Combustion Engineering (CE) for the purchase and fabrication of two steam generators (*i.e.*, boilers) and, thereafter, a whole series of construction-related contracts and commitments for the development of this new greenfield source.

By letter dated February 27, 1978, to EPA Region IX, the Company informed EPA that TEP had "placed an order for boilers on Units 1 and 2 at our Springerville Generating Station . . . on January 30, 1978," and that, "[i]n accordance with this, we 'commenced construction' on that date." TEP continued that the Company was "proceeding with bids for turbines and with other activities in order that the first unit [at the source] will available in 1985." In a similar letter dated February 28, 1978, TEP informed the Arizona Department of Health Services that (i) EPA had issued a PSD permit for the Springerville source, consisting of Units 1 and 2; and (ii) the Company had entered into the boiler contract with CE. In this regard, the letter noted specifically that "[o]n January 30, 1978, a firm order was placed for steam boilers for Units 1 and 2 and, as a result, according to EPA definitions, 'construction commenced' on that date." This and other contracts were executed before the Subpart Da NSPS were proposed in September 1978 and

[1] Initially, TEP sought a PSD permit to construct three units at the Springerville site. After EPA indicated that further air quality analysis would be required before the third unit could be issued a construction permit, the Company in 1977 withdrew its request for a permit to construct Unit 3. TEP later renewed its application for a PSD permit for Unit 3, which permit was issued by EPA on April 11, 1980. Subsequently, the Company declined to go forward with construction of Unit 3 and the permit was allowed to expire.

before the date on which construction had to be commenced (*i.e.*, March 19, 1979) in order for the source to be "grandfathered" under the PSD rules adopted in June 1978.

From the time that the boiler contracts were executed until completion of construction of the source shortly before commencement of operation of Unit 2, the Arizona Department of Health Services and EPA Region IX were kept apprised by TEP of the Company's continuous progress in the construction of Units 1 and 2. In particular, in correspondence in September 1981 with EPA Region IX regarding TEP's renewed permit to construct Unit 3 (see note 1, *supra*), the Company indicated that it was on schedule to complete Unit 1 in 1985, Unit 2 in 1987, and Unit 3 in 1990 – a construction schedule of seven years for the first unit at the source and 10 years for completion of construction of the second unit at the source.

Construction on Unit 1 proceeded without interruption in accordance with the original schedule. Construction was completed and trial operation took place in February 1985. Unit 1 went into commercial operation in June 1985. As for Unit 2, construction was also continuous and uninterrupted, but was not completed until 1990 following the decision to cancel Unit 3 (which unit, as was noted earlier, originally had a 1990 completion date). Construction at the Springerville source was completed and the first steam to the Unit 2's turbine occurred in March 1990.

Discussion

Source owners apply for permits with the expectation that they will thereby be exempt from future regulatory requirements. They plan and undertake the permitting of a project based upon the schedule by which significant financial commitments must be undertaken in order to place a source into operation by the date it is needed to meet the anticipated future demand.

Throughout the 1970s and 80s, new greenfield sources in the West required a much longer "lead time" than expansion of an existing facility in the East and Midwest that already had in place the infrastructure to accommodate the addition of a new unit. In the West, coal delivery facilities had to be developed, water resources had to be developed, and construction roads over a significant distance had to be developed in order to construct a new greenfield source such as Springerville.

The central question posed by the Region IX staff position is whether EPA can judge the Springerville Unit 1 and 2 construction schedule on the basis of how EPA judged the PEPCo Dickerson expansion in its 1979 determination. For the reasons discussed below, the 1979 PEPCo determination provides neither a controlling precedent to judge the Springerville case, nor a basis for an enforcement action against TEP.

I. Springerville Units 1 and 2 Are Subject to NSPS Subpart D, not Subpart Da.

Springerville Units 1 and 2 are subject to Subpart D of the NSPS. There is no basis for Region IX staff's contention that Springerville Units 1 and 2 are subject to Subpart Da.

Regulatory Background

As enacted in 1970, the Clean Air Act (CAA) provides that NSPS apply to those sources in a specific category which have "commenced construction" after the date of the proposal of the NSPS applicable to that source category.[2] Under EPA's rules, subsequent Agency memoranda, and court decisions, the "affected facility" for power plants is the boiler.[3]

EPA defined "commenced" to mean:

> that an owner or operator has undertaken a continuous program of construction or modification *or* that an owner or operator has entered into a binding agreement or contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification.

See 40 C.F.R. § 60.2(i) (1972) (emphasis added).[4] Although the NSPS definition was changed slightly in 1974,[5] its overall wording and meaning have stayed the same: one must *either* start a continuous program of on-site construction *or* enter into contracts that obligate the source owner to a continuous program of construction that will be undertaken and completed within a reasonable time.[6]

EPA first proposed new source performance standards (NSPS) for power plants in August 1971, and promulgated those NSPS in 1972. The 1971 NSPS – codified in Subpart D of 40 C.F.R. Part 60 – require affected coal-fired power plants to use either a low sulfur type of coal or scrubbers to meet an SO_2 emission limitation of 1.2 pounds MMBtu. EPA proposed revisions to its power plant NSPS on September 18, 1978, and published final revised rules on June 11, 1979. The revised 1978 NSPS – codified in Subpart Da of 40 C.F.R. Part 60 – in effect require scrubbers having a removal efficiency of at least 70% for units burning low sulfur coal.

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[2] *See* CAA § 111(a)(2); (b) (providing that "new sources" are subject to the NSPS and defining "new source" to include "any stationary source, the construction or modification of which is commenced after publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section").

[3] EPA's rules specify that, for a power plant, the boiler is the affected facility. *See* 40 C.F.R. § 60.41(a).

[4] 36 Fed. Reg. 24,877 (Dec. 23, 1971).

[5] On March 8, 1974 (39 Fed. Reg. 9313), EPA dropped the phrase "binding agreement" as being duplicative.

[6] *See, e.g.*, Letter from E. Reich (EPA) to R. Cool (CARG) (Oct. 4, 1979); Letter from J. Miller (EPA) to T. Watson (Crowell & Moring) (May 23, 1980); *see also City of Painesville*, 431 F.Supp. 496 N.D. Ohio 1977).

Analysis

TEP "commenced construction" of the affected facilities at Springerville Units 1 and 2 prior to September 18, 1978 (*i.e.*, the date on which the Subpart Da revisions to the power plant NSPS were proposed). As was previously noted, on January 30, 1978, the Company entered into a contract with CE for the purchase and fabrication of the boilers (*i.e.*, the "affected facilities") for Units 1 and 2, and proceeded to the uninterrupted execution of numerous other contracts and site-related activities necessary to complete construction of Unit 1 in seven years and Unit 2 in 10 years. In February 1978, both EPA Region IX and the Arizona Department of Health Services were informed by a letter from TEP that, pursuant to this contract, "construction" had "commenced" on Units 1 and 2.[7]

While there were written and oral communications with Region IX and Arizona regulators following these letters reciting continuing construction activities, neither Region IX nor the State of Arizona took issue with TEP's position that construction of both units had "commenced" for NSPS purposes before proposal of the Subpart Da NSPS in September 1978, either at the time the Region was informed of the boilers contracts in February 1978, or prior to the Company's completing construction of Unit 1 in 1985 and Unit 2 in 1990 based on the nature or pace of contracting or construction activities at either unit. Neither the CAA nor EPA's NSPS regulations provide any mechanism by which the Agency can, some 23 years later, retroactively conclude that Springerville Units 1 and 2 should have instead been required to meet the requirements of Subpart Da, long after it could have incorporated technology to meet new standards into its original design before actual construction.

This case is readily distinguishable from the PEPCo Region III determination on which Region IX staff now apparently relies.[8] In the case of PEPCo, Region III determined that, presumptively, seven years was a reasonable time in which to complete a single additional unit (Unit 4) at the existing Dickerson power plant. Springerville Unit 1, of course, was completed within seven years. As to Unit 2, a seven year presumption bears no relevance to the

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[7] *See* Letter from J. Thomas Via, Jr., Vice President, Tucson Gas & Electric Company, to R.L. O'Connell, Director, Enforcement Division, U.S. Environmental Protection Agency, Region IX (Feb. 27, 1978); Letter from J. Thomas Via, Jr., Vice President, Tucson Gas & Electric Company, to Suzanne Dandoy, Director, Arizona Department of Health Services (Feb. 28, 1978).

[8] *Cf.* Letter from J. Schram, Regional Administrator, EPA Region III, to A. Kirk, PEPCo (July 23, 1979). In the case of PEPCo, EPA Region III concluded that an 11 to 13 year schedule for completing PEPCo's Dickerson Unit 4 was not a "reasonable time" under 40 C.F.R. § 60.2. In so determining, EPA Region III took particular note of the fact that PEPCo had entered into a boiler contract for Dickerson 4 in 1972. As of July 1979, however, "no physical construction of Dickerson 4 has occurred on-site in four and one-half years" and that none was "scheduled to begin for over two years." As a consequence, Region III observed, "there has been and still remains ample time for PEPCO to change the existing design to accommodate the control system required by these regulations at a minimum cost, without delaying the Company's latest schedule for construction and operation of this unit." *See* EPA Region III PEPCo Determination at 5.

"reasonableness" of an overall 10-year schedule for the construction of the second of *two* units at a greenfield plant site, as was the situation with Springerville. It is logically fallacious to assume that, if it is "reasonable" to complete construction of one unit in seven years at an existing developed site, it is equally "reasonable" to expect that two units at a new greenfield site can, or should, *both* be completed within seven years.[9]

Moreover, in PEPCo's case, EPA Region III took note of the fact that progress on the construction of Dickerson Unit 4 had been suspended for some four and a half years following the company's entering into a construction contract, and that work was not expected to resume for at least another two years. In those circumstances, Region III's determination that Dickerson 4 would not be completed within a "reasonable time," and that Subpart Da of the NSPS applied, should be viewed as a determination that construction of Dickerson Unit 4 had been abandoned (like construction of Springerville Unit 3 was abandoned in the mid-1980s), and that, as a result, a new "commencement" date had to be established.

This reading is reasonable since it was made at a time when PEPCo could still incorporate the necessary additional control technology into the unit's design prior to re-initiation of construction. Such would not be the case with Springerville, however, where no determination was made by Region IX when contract information was submitted to it eight months before the Subpart Da standards were proposed, nor was it made at any other time during the construction of both units. Making a determination that Subpart Da applies to Units 1 and 2 some 11 to 16 years *after* completion of construction finds no precedence in the PEPCo determination.

Finally, the State of Arizona, in issuing the Title V operating permit for Units 1 and 2, imposed conditions requiring compliance with applicable federal CAA requirements, including the Subpart D NSPS. By specifying Subpart D as the applicable NSPS at Units 1 and 2, the state also determined that Subpart Da was *not* the applicable NSPS (both cannot apply to the same facility on the basis of when the facility "commenced construction"). EPA did not raise any objection to that permit on the grounds that Subpart Da, not Subpart D, was the applicable requirement. Accordingly, the Title V "permit shield" precludes EPA from asserting now that Units 1 and 2 are in violation of Subpart Da.[10]

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[9] In the case of the Springerville plant, while construction activities took place with respect to both Units 1 and 2 from 1978 to 1985 (when Unit 1 was completed), the lack of available skilled labor at the remote plant site, among other things, would have precluded any schedule that called for the simultaneous completion of both units within seven years. Nor would it be "reasonable" to construct simultaneously units that were not required to meet projected future demand at the same time.

[10] Further, any claim by EPA Region IX now that Springerville Units 1 and/or 2 are liable for having operated "out of compliance" with Subpart Da of the NSPS since 1985 and 1990, respectively, would founder on the fact that TEP was not afforded "fair notice" of the Region's current interpretation of the "reasonable time" criterion, given its silence throughout construction between (i) 1978 and 1985 (Unit 1), and (ii) 1978 and 1990 (Unit 2), as well as its silence in approving the Title V operating permit for Springerville. That is, even if such an interpretation

II. TEP's Authority to Construct Unit 2 under the 1977 PSD Permit for the Springerville Source Cannot Be Retroactively Revoked, and, in Any Event, Construction of the Source Was Completed Within a Reasonable Time.

At the present time, it is difficult to ascertain the precise basis for Region IX staff's apparent contention that TEP should have installed on Springerville Unit 2 additional controls beyond that which constituted BACT when a PSD permit for the unit was first issued by EPA in December 1977. Although TEP has received nothing formal in writing from Region IX regarding this matter, based on recent communications the Company has had with certain Regional staff, it would appear that the Region IX staff is proceeding under the assumption that EPA can somehow retroactively "revoke" the PSD permit which was issued for Unit 2 in 1977, by determining now – more than 10 years after the fact – that TEP did not complete construction of Unit 2 within a "reasonable time."

Such a position reflects a serious misunderstanding of the applicable PSD regulations. EPA has no authority under its regulations to revoke retroactively a PSD permit, require a source to undergo further review, and install additional pollution controls, after construction of a unit is complete. Moreover, even if EPA did have such authority to revoke retroactively a previously-issued PSD permit and require new permitting, under the facts of the present case there is no question that construction on Springerville Unit 2 was completed within a "reasonable time."

Regulatory Background

Some background regarding the PSD permitting program is necessary if any sense is to be made of Region IX staff's argument. EPA first promulgated a PSD program in 1974. The scope of the preconstruction review called for under the 1974 rules was relatively limited: a source had to do little more than undergo a review to demonstrate that it was installing BACT. The BACT requirement was satisfied by meeting the applicable NSPS.[11]

When Congress amended the CAA in 1977, it enacted more stringent PSD requirements, which were implemented by EPA in 1977 "transition" rules, and then in 1978 final regulations. Under the final 1978 requirements, affected sources had to undergo additional source impact analyses and BACT review imposing control requirements that had to be at least as stringent as – but which could be more strigent than – those set out in the applicable NSPS.[12]

(..continued)
were deemed to be a permissible reading of the regulatory provisions at issue, the "fair notice" concept mandates that that interpretation could be applied prospectively only. *See, e.g., U.S. v. Chrysler Corp.*, 158 F.3d 1350, 1354-57 (D.C. Cir. 1998).

[11] *See* 40 C.F.R. § 52.01(f), § 52.21(d)(2)(ii) (1974); *appearing at* 39 Fed. Reg. 42,514, 42,516 (Dec. 5, 1974).

[12] *See* 40 C.F.R. § 52.21(b)(10), § 52.21(j); *appearing at* 43 Fed. Reg. 26,404, 26,406-407 (June 19, 1978).

In order to determine which, if any, of the various sets of PSD rules applies to a given source, it is necessary to look at the source applicability provisions of each set of PSD rules. The November 1977 "transition" rules provided that if the *source* (i) received a PSD permit between August 7, 1977, and March 1, 1978, and (ii) the *source* commenced construction by December 1, 1978, the *source* would be covered by the transition rules, which were slightly more stringent than EPA's 1974 rules, but less stringent that the final PSD rules were anticipated to be. In general, BACT under the 1977 transition rules could still be satisfied by meeting the applicable NSPS; under the 1978 rules it could not.

When EPA promulgated its final PSD rules, on June 19, 1978, the Agency added a further requirement for a source to be "grandfathered" under the 1977 transition rules – and, thus, not be subject to more stringent subsequently-revised PSD rules. Specifically, a source is subject to the 1977 rules if the source (i) received a PSD permit by March 1, 1978; (ii) commenced construction before March 19, 1979; *and* (iii) did not "discontinue construction for a period of 18 months or more *and completed construction within a reasonable time.*" *See* 40 C.F.R. § 52.21(b)(i)(iii) (emphasis added).

As has been noted, TEP received a PSD permit for a new greenfield source (Springerville Units 1 and 2) in December 1977; commenced construction of the source by entering into a contract with CE for the Units 1 and 2 boilers in January 1978, and undertaking numerous other contracts after that date and before March 19, 1979; and engaged in continuous construction of the two-unit source until its completion in March 1990. At the time the Company undertook construction of the source which included Unit 2, it did so with the understanding that Unit 2 could not be *required* to meet BACT levels imposed by the 1978 transition rules, rules that could require controls beyond the inapplicable Subpart Da NSPS.[13] In arguing that Unit 2 should now be required to meet more stringent requirements, Region IX staff apparently believes that the TEP did not complete construction of the Springerville source "within a reasonable time," either because Unit 2 was not scheduled for completion until 1987, or because Unit 2 did not actually complete construction until 1990.

As is explained below, there is no basis for the staff's position that Unit 2 is subject to PSD preconstruction review requirements that are more stringent than the 1977 PSD requirements. The time for asserting that position was when the two-unit greenfield source was under construction. To effect this result, EPA would have had to have (i) determined that TEP would not complete construction of the unit within a reasonable time; and (ii) having informed TEP of that determination, demanded a new round of PSD preconstruction permitting before TEP could lawfully continue with construction of Unit 2. Despite full disclosure of Unit 2's construction schedule, and construction activities, throughout the 1980s to its completion in 1990, EPA Region IX never even suggested that construction of Unit 2 would not be completed

[13] In the case of Springerville Units 1 and 2, unlike units permitted in the east and midwest under the 1977 PSD rules that had BACT limits that were not more stringent than the Subpart D NSPS, the BACT limits for Springerville Units 1 and 2 were more stringent than the Subpart D NSPS. Indeed, they approached the Subpart Da NSPS promulgated in June 1979.

within a reasonable time nor otherwise questioned the legality of that unit's continued construction.

Analysis

The provision added by the 1978 final PSD rules specified that a source would be considered "grandfathered" under the 1977 transition rules if construction (i) was commenced by a particular date (March 19, 1979); (ii) not suspended for 18 months or more; and (iii) was completed "within a reasonable time." While the first two conditions establish objective deadlines that might be read to allow EPA to determine that a permit could be revoked by operation of law, the "reasonable time" criterion is not objective and cannot be said to define an objective deadline. Rather, this "reasonableness" criterion requires EPA to exercise discretion and explain the basis for its determining that construction will not be completed within a "reasonable" time. In other words, to subject a PSD-permitted unit at a source to new preconstruction PSD review based on the "unreasonableness" of the source's construction schedule, EPA must, at the time construction is still ongoing, order the source to halt any further construction until the source applies for, and undergoes, a new round of NSR preconstruction permitting, pursuant to whatever PSD requirements might then be in effect.

Contrary to Region IX staff's apparent position, the PSD rules do not authorize EPA to declare *after* completion of construction the retroactive "revocation" of a validly-issued PSD permit, on the ground that EPA has – many years after the fact – concluded that construction of the source was not completed "within a reasonable time." Such an interpretation is incompatible with the plain language of the PSD rules, runs counter to the rules' fundamental logic, and is contrary to fundamental fairness reflected in federal retroactivity law.

Under the PSD rules, the *only* situation in which EPA is authorized to regard an existing source as one that has not yet commenced construction, and require it undergo NSR pursuant to current PSD requirements, is set forth in 40 C.F.R § 52.21(r)(4), which provides that

> [a]t such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the requirements of paragraphs (j) through (s) of this section shall apply to the source or modification as though construction had not yet commenced on the source or modification.

The provisions of paragraph (r)(4) do not apply to TEP's situation.

Moreover, when one considers the logical implications of the Regional staff's position, it become clear that their view of the PSD rules' "reasonable time" provision is completely untenable. That is, if EPA can declare, in 2001, that the PSD permit issued for Springerville Unit 2 should have been terminated at some point in the 1980s – *i.e.*, prior to the unit's having

completed construction – what then is the regulatory consequence? The most that Region IX staff could argue is that, for some period of time from the time the permit was said to have been retroactively "revoked" until construction of Unit 2 was completed in 1990, TEP was engaged in construction activity without a valid PSD permit, and thus was acting in violation of the PSD rules. Even if this bizarre fiction could be entertained,[14] any such "violation" ceased with the completion of construction in March 1990, well outside the applicable five year statute of limitations.[15]

There is no basis, in any event, for Region IX staff to conclude that the construction of the greenfield Springerville source (*i.e.*, Units 1 and 2) was not completed within a reasonable time. Again, the Regional staff appear to be relying on the applicability determination issued by EPA Region III in July 1979 to PEPCo regarding the construction of Unit 4 at PEPCo's Dickerson power station. Region IX staff appear to reading Region III's PEPCo determination as establishing an irrebuttable presumption that seven years is a reasonable time for completion of a coal-fired electric utility unit and that an 11 to 13 year construction schedule – which is schedule that was under scrutiny at Dickerson Unit 4 – is *per se* "unreasonable." This reading ignores the fact that the PEPCo case involved the addition of a new unit at an existing source, whereas Springerville involves a construction schedule for a new, two-unit greenfield generating

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[14] Of course, the reality is, throughout the entire period of construction of Unit 2, up through the time construction was completed in 1990, TEP was constructing the unit pursuant to a validly-issued PSD permit, with the nature of nature construction activities being disclosed to EPA Region IX and the State of Arizona. EPA never took any action during that time to revoke the Company's permit or otherwise order TEP to cease construction. To this day, the requirements in that permit have governed the operations of Units 1 and 2. By including those requirements in the Title V operating permits for Units 1 and 2, EPA and the State of Arizona necessarily recognized that this permit was *not* somehow invalidated at some point in the past. If the permit was somehow revoked in the past by operation of law, these limitations would not be "applicable requirements" and would not be federally enforceable. However, they clearly are currently federally enforceable requirements in the Springerville Title V operating permit.

[15] *See* 28 U.S.C. § 2462 ("Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued."). A claim "first accrues" under 28 U.S.C. § 2462 on the date that a violation first occurs. *See, e.g., 3M Co. v. Browner*, 17 F.3d 1453, 1462 (D.C. Cir. 1994). Furthermore, a "violation for failure to obtain a construction permit" under the PSD rules "does not continue once the unpermitted construction is completed." *See, e.g., U.S. v. Westvaco Corp.*, No. 00-2602, slip op. at 12 (D.C. Md., April 23, 2001). And, certainly, EPA would be entitled to no injunctive or equitable relief. During the entire period of Unit 2's construction, the Agency – apprised of the TEP's schedule for the completion of Unit 2 – never objected to that schedule on the grounds that completion would occur within a "reasonable time." Only now, more than *11 years after* construction of Unit 2 was completed, have Region IX staff suggested that TEP took too long to finish the project.

station, with the first unit projected to be constructed in seven years and the second three years later.[16]

Region IX staff misconstrue the relevancy of the 1979 PEPCo determination. In the PEPCo case, EPA Region III had to determine whether PEPCo had initially "commenced construction" of Dickerson Unit 4 under the "contractual obligation" prong of the definition, long after PEPCo had suspended construction of a unit that was proposed to be added to the Dickerson existing source. In evaluating the subject contract, Region III focused on what was a normal or reasonable construction schedule for the addition of a unit at an existing source.

What the "normal" construction schedule was for the addition of a unit at an existing source may well be relevant in determining whether Springerville Unit 1's seven year construction schedule was "reasonable." Under Region III's Dickerson Unit 4 decision, Springerville Unit 1's schedule was clearly "reasonable." Construction was completed within seven years. The PEPCo case, however, does not address, and has no relevance to, what is a "reasonable" schedule for a *new two unit greenfield source.*

In making an evaluation under the PSD post-commencement rules that apply to the construction schedule for a "source," EPA has made clear that all factors are relevant to EPA's applying the "reasonableness" standard established in those rules. For example, in a July 1, 1978 internal EPA memorandum, the Agency discussed what constitutes a "reasonable time" for completion of construction, explaining that in order

> to assure that construction proceeds in a continuous manner *and is completed within a reasonable time*, the [federal PSD] regulations require that a break in construction of greater than 18 months or failure to commence construction within 18 months of permit issuance will generally invalidate a source's PSD permit.[17]

This suggests that if source construction starts promptly after permit issuance (which is indisputably true in the case of Springerville Units 1 and 2), and if construction is completed with no substantial break (*e.g.*, 18 months) in the construction (which, again, is indisputably true in the case of this new greenfield source, Springerville Units 1 and Unit 2), then construction of the *source* will be deemed to have been completed within a reasonable time.

In addition, when the Agency wrote (and later defended) its 1978 rules imposing on PSD permittees the obligation to follow a "reasonable" construction schedule, EPA offered the explanation that, in adopting its "reasonable time" criterion, it did not adopt absolute limits on what is a reasonable time for completing construction. Citing the preamble to the 1978 PSD

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[16] *See* note 9 *supra*.

[17] *See* Memorandum on Commence Construction under PSD from the Director of the Division of Stationary Source Enforcement to D. Kee, Chief Air Enforcement Branch, Region V (July 1, 1978) (emphasis added).

rules, the Agency's brief in *Alabama Power Co. v. Costle*, 636 F.2d 323 (.D.C. Cir. 1979), explained that

> what constitutes a reasonable time *depends on the circumstances of each case*. The Administrator does not generally intend to limit the time for construction of the project.[18]

In sum, this guidance from EPA indicates that, contrary to Region IX staff's apparent misapprehension, the Agency has imposed no hard-and-fast rule that it must be demonstrated that each unit at a source is being constructed within seven years. Rather, the circumstances of the case, when one is dealing with a multi-unit greenfield source, must determine the reasonableness of the construction schedule for the "source," as the rules by their plain terms require.

Indeed, the EPA guidance creates a presumption that if a source owner starts construction promptly of a new multi-unit source and then completes it with no substantial breaks in the program (as was the case with Springerville Units 1 and 2), construction will have been completed in a "reasonable time." At a minimum, EPA's position on this issue would appear to establish that, for purposes of the post-commencement construction obligation imposed by the 1978 PSD rules, the meaning of "reasonable time" is, in fact, *dependent* upon consideration of all facts and circumstances affecting the construction schedule of the entire source covered by this requirement.

Finally, all three of the Springerville units (including Unit 3, which was permitted under the 1980 PSD rules) were permitted by Region IX with the understanding that the construction program being authorized for the two unit source was a 10 year schedule (and, later, when Unit 3 was permitted, a 13 year schedule). A two or three year extension in that schedule for construction of the Springerville source, which stemmed from changing economic circumstances in the 1980s that could not have been predicted when the source was originally permitted in 1977, does not establish that the two unit source failed to complete construction within a "reasonable time." Certainly, given the subjective nature of "reasonableness" determinations generally, new obligations cannot be imposed on Springerville based on a determination, made 11 years after construction was completed, that construction had not been completed in a "reasonable time."

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[18] EPA Brief at 304 (emphasis added).

Congress of the United States

Washington, DC 20515

May 25, 2001

The Honorable Christine Todd Whitman
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20004

Dear Administrator Whitman:

We are writing to you about securing clean, efficient sources of electric energy for Arizona. Tucson Electric Power Company's (TEP) proposal to build Units 3 and 4 at its Springerville generation facility will help meet this need. Like many states in the West, Arizona must properly plan for future electricity demands. The Springerville expansion would add 760 megawatts to Arizona's base load generation resources without increasing SO_2 or NO_x emissions.

It is our understanding that EPA officials have raised questions regarding the air permits for the two existing units, thereby causing uncertainty for construction of the two new units. TEP's application to the Arizona Department of Environmental Quality calls for reductions in SO_2 and NO_x emissions from existing Units 1 and 2. We are advised that those reductions, combined with the removal levels TEP has proposed for Units 3 and 4, would result in no additional emissions of SO_2 and NO_x from the Springerville facility, i.e., total emissions from 1520 MW of generation would be the same or lower than currently produced from 760 MW.

One of the factors that inhibits the production of new generation capability throughout the country is the uncertainty over rules and permits. This cloud of uncertainty must be removed while maintaining safety, public health and environmental protections. We request that you give full and fair consideration to TEP's permit application consistent with applicable law and regulations and expect you to report back to us with your findings as soon as possible.

Thank you in advance for your prompt attention to this matter.

Jon Kyl

Senator Jon Kyl

Congressman Bob Stump

Jim Kolbe

Congressman Jim Kolbe

Ed Pastor

Congressman Ed Pastor

Congressman John Shadegg

Congressman J.D. Hayworth

Congressman Jeff Flake